

Commission's study of ownership concentration in ten markets nationwide shows that all but one of those markets currently enjoy more broadcast outlets owned by more different broadcasters than at any time in the past.²³ There are now seven competitive broadcast networks even though most viewers still can remember a time when they were lucky to have three network affiliates and an independent UHF channel or two on their television dials.

Just as the three-network home entertainment universe is ancient history, however, a consideration of the national broadcasting ownership cap that takes only the state of the broadcasting industry into account would seem quaint, indeed. The erosion of broadcast television's former hold on television viewers is a much remarked upon phenomenon. Today cable television and direct broadcast satellite television bring consumers so many programming choices that network prime time viewership has declined to just 57% today.²⁴ Moreover, the Internet, which offers consumers every type of information and commercial shopping opportunity imaginable also has begun to take a central place in a media market that increasingly rewards content providers able to reach ever-smaller fragments of what was once a mass-market audience. Outside the realm of video entertainment, broadcasters face competition for viewers time and interest from traditional media outlets like newspapers, radio, movies, home video, news and entertainment magazines and the old-fashioned but still relevant books.

programming by turning to alternatives such as PAXTV and other family oriented programmers.

²³ See Scott Roberts, Jane Frenette, and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets*, September 2002.

²⁴ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eighth Annual Report*, 17 FCC Rcd 1244, 1282.

Although these diverse media appear to broadcasters as competitors, they appear to consumers as a dizzying array of diverse and high quality entertainment and news choices. In this environment, it is difficult to believe that the Commission could find that either diversity or competition were in danger. That this diversity exists at a time when two broadcast networks currently maintain broadcast holdings that exceed the Commission's current 35% national ownership cap should not be ignored. It is difficult to see exactly what even the most powerful broadcast groups – FOX or Viacom – could do to squelch the diversity of voices and outlets that is challenging them from every direction.

Indeed there is no way to deduce from the current diverse media marketplace that the 35% ownership cap is necessary in the public interest. Even if intuition tells the Commission that increased consolidation is bad for diversity and competition, its experience with the elimination of the national radio ownership limits belies that concern. The Commission's ownership studies show that the elimination of national radio ownership limits has not led to significant declines in diversity at either the local or national level, and has not had any significant negative effect on competition or price in the local and national advertising markets.²⁵

Diversity in the video delivery and greater news and entertainment media markets now is at a high enough intensity that the Commission must ask itself whether

²⁵ Peter Alexander, *Radio Market Structure and Music Diversity*, Media Bureau Staff Research Paper, September 2002; George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership Format and Finance*, Media Bureau Staff Research Paper, September 2002; Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Media Markets*, Media Bureau Staff Research Paper, September 2002.

the 35% cap isn't artificially hindering broadcasters' ability to compete with media conglomerates like AOL Time Warner, Comcast, and Liberty Media which do not labor under ownership rules that are nearly so restrictive.²⁶

This is particularly the case in light of the misrepresentative structure of the ownership cap. As has been pointed out in many contexts, the practice of crediting each broadcast station with all the homes in its DMA vastly overstates the actual reach of each broadcaster.²⁷ Testifying before Congress in July, 2001, Mel Karmazin of Viacom indicated that stations actually reach, on average, about fifteen percent of their market.²⁸ Similarly, NBC CEO Bob Wright has noted that even assuming a station reaches all the homes in its market, it is likely being viewed by only about 2-3% of those homes, meaning that a station with a reach of 25% under the FCC's rules, probably reaches no more than 6% of viewers at any given time.²⁹ Consequently, as the *Ownership NPRM* points out, broadcasters ownership limitations are based on the

²⁶ See *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (2001) (reversing and remanding horizontal and vertical national ownership restrictions for cable operators); see also Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, the Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, *Further Notice of Proposed Rulemaking*, 16 FCC Rcd 17312 (2001).

²⁷ As described in Section B below, even where the UHF discount is employed, actual station reach is still overstated.

²⁸ See e.g. Hearing of the Senate Commerce, Science, and transportation Committee Regarding Media Concentration, July 17, 2001 (testimony of Mel Karmazin).

²⁹ Statement Submitted by Lowell "Bud" Paxson, Chairman of Paxson Communications Corporation, for the Record To the Senate Commerce, Science & Transportation Committee Hearing On Broadcast Ownership, July 17, 2001.

demonstrably false premise that broadcasters reach every home in their market while cable ownership limits are based only on homes served.³⁰ If the ownership cap is maintained at its current level, this disparity will no doubt result in severe market distortions in the long run. The Commission should preempt this problem by increasing the broadcast national ownership cap now.

2. The Commission Should Immediately Raise the Ownership Cap to 50%, Then Increase the Cap by 2.5% Biennially.

Paxson believes that the wisest course is to liberalize the current rule at a pace that allows for all existing station combinations, but preserves the Commission's flexibility to exercise some control if increasing consolidation begins to have ill effects.

Such ill effects are unlikely. The Commission has recognized that consolidation and vertical integration have and are likely to continue to improve the news and entertainment content of the major broadcast networks³¹ and that network owned and operated stations tend to program larger amounts of higher quality news and public affairs programming.³² These findings, coupled with the developments of the deregulated radio industry give the Commission more than enough evidence to

³⁰ *Ownership NPRM*, ¶¶ 154-155.

³¹ Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programming*, September 2002; Amendment of Section 73.658(g) of the Commission's Rules - The Dual Network Rule, *Report and Order*, 16 FCC Rcd 11114, 11122-23, 11123-24 (2001); Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12930 (1999) ("*Duopoly Order*").

³² Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programming*, September 2002.

significantly relax the national ownership rule now and set a timetable for further liberalization of the rule.

Accordingly, the Commission should immediately increase the ownership cap to 50%, which will accommodate all existing broadcast combinations and give some additional room for growth. The Commission also should establish a presumption that it will increase the cap by at least 2.5% on a biennial basis until the cap reaches 60%. As part of each biennial review proceeding, the Commission should evaluate developments in the television broadcast and greater media markets and determine whether it should increase the cap more quickly or slowly. Once the cap reaches 60%, the Commission should continue to monitor conditions in the broadcast industry, but without a presumption that additional relaxation of the cap will occur. If conditions remain as strongly competitive as they are now, further relaxation may be in order.

This course is consistent with the Commission's mandate under Section 202(h) because it would embody the Commission's judgement that the current cap is not necessary in the public interest, but that immediately eliminating any cap also is not in the public interest. For the last 60 years, broadcasters have calibrated their business activity against the background of national ownership limitations. They should now be given the opportunity to adjust those plans over time to accommodate the potential changes that unlimited national ownership could bring. Moreover, there are enough potential dangers in relaxing the cap to justify a go-slow approach.³³ Paxson reiterates

³³ *1998 Biennial Review*, 15 FCC Rcd at 11072-75, *but see FOX TV Stations*, 280 F.3d at 1044 (describing deregulatory message of Section 202(h)); *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 171 (Sentelle, J., concurring and dissenting) ("*Sinclair*") (same).

that it expects increases in the cap to have no ill effects on diversity, competition, or localism. Section 202(h) does not, however, require the Commission to ignore concerns about possible market distortions that could be caused by increased consolidation simply because it cannot demonstrate with certainty that those effects will occur. The course Paxson proposes steers a middle course that is firmly deregulatory, but that will leave the Commission with options if market distortions occur.

B. Both Law and Logic Dictate that the Commission Retain the UHF Discount.

Unless the Commission decides to eliminate the national broadcast ownership cap immediately, it must continue to apply the UHF discount.³⁴ The Commission upheld the UHF discount just two years ago after compiling a full record.³⁵ The Commission further indicated that it would again review the issue at some point “near the completion of the transition to digital television.”³⁶ This recent determination continues to be supported by the relevant evidence, and the DTV transition has not yet progressed to the point where additional consideration of eliminating the discount is necessary or warranted.

1. The Commission’s Reasons For Maintaining the UHF Discount Remain Apt.

The Commission elected to maintain the UHF discount chiefly because of the technical inferiority of UHF signals as compared to their VHF counterparts and because

³⁴ *Ownership NPRM*, ¶ 130-131.

³⁵ *1998 Biennial Review*, 15 FCC Rcd 11078-80.

³⁶ *Id.* at 11080.

of the higher operating costs associated with UHF stations.³⁷ Nothing has changed in the past two years to undermine those conclusions. As the Commission initially recognized in adopting the UHF discount in 1985, and has consistently affirmed, UHF signal strength declines more rapidly over distance than VHF signal strength. Consequently, UHF stations are unable, by nature, to reach as many viewers as VHF stations. This technical disparity leads to a significant economic disparity, reducing the ability of UHF stations to compete effectively with VHF stations and, potentially, adversely impacting diversity. The UHF discount therefore serves a dual purpose: first, it employs a rough and ready means of estimating the actual reach of UHF stations; and second, it provides an incentive to UHF station owners to acquire additional stations, thereby allowing them to take advantage of the efficiencies associated with group ownership without a pressing concern that they will transgress the national ownership cap. The end result of this rule is more stations, greater diversity, and greater competition. In 1985, there were 365 UHF stations operating in the United states;³⁸ today that number has grown to 752, a 106% increase.³⁹

When the Commission upheld the UHF discount two years ago, it was fully aware of the developments since 1985 that have supposedly alleviated the technical disparity justifying the UHF discount. Specifically, the Commission considered the impact that improvements in television receiver technology and the carriage of UHF

³⁷ *1998 Biennial Review*, 15 FCC Rcd at 11078-79.

³⁸ *See Broadcasting Cablecasting Yearbook 1985* at A-2.

³⁹ *See Broadcast Station Totals as of September 30, 2002, Press Release* (rel. November 6, 2002).

stations on cable and DBS systems have had on the continuing need for the discount.⁴⁰ It is therefore surprising that the Commission should request additional comment on this point.

Neither gains in receiver technology nor mandatory carriage of UHF signals can improve the signal strength of UHF stations. The fact remains that UHF stations, based on technical disparity alone, do not reach as many viewers with an over-the-air signal as VHF stations. Similarly, the inherent propagation deficiencies and lack of robustness to the UHF signal preclude it from placing a Grade B signal over as many local cable headends as their VHF counterparts, thereby potentially reducing their rights to cable carriage. Consequently, UHF stations' ability to reach both over-the-air and cable viewers in their respective markets is compromised severely.

As the Commission has recognized, UHF stations' inherent technical inferiority is accompanied by built-in economic disadvantages. Given their weaker signal strength and inability to reach as many viewers as VHF stations, UHF stations simply do not garner the same revenues or audience share ratings as their VHF counterparts. Moreover, the costs of operating a UHF station remain high, exceeding the costs incurred by VHF stations, and placing an economic burden on the owners of UHF stations. These operating costs include higher electricity costs generated by UHF stations and the greater cost of UHF antennas that Paxson has detailed in the past.⁴¹ Even the supposed panacea of cable carriage can impose additional costs on UHF

⁴⁰ See *1998 Biennial Review*, 15 FCC Rcd at 11075-77, 11078.

⁴¹ *Paxson Biennial Comments* at 11.

stations forced to provide additional technical support to provide a quality signal to local cable headends to guarantee cable carriage.

2. UHF Technical Inferiority Will Not Be Solved By the Transition to DTV.

These inequities will not be solved by the transition to digital broadcasting. Although the Commission has attempted to ameliorate the UHF/VHF disparity by allowing UHF stations to maximize their service area,⁴² stations are permitted to maximize facilities only in theory; in practice, stations in the most congested markets are unable to maximize due to anticipated interference with surrounding stations.⁴³ If anything, the DTV transition likely will exacerbate UHF deficiencies for the 14% of people and 30% of television sets that still receive service over-the-air, due to the much discussed DTV “cliff-effect.”⁴⁴ Whereas viewers of UHF stations’ over-the-air signals may have been willing to put up with minor interference to UHF stations’ analog signals, they will not get that chance with DTV because once a station’s signal strength falls

⁴² Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Report and Order*, 12 FCC Rcd 14588, 14605-06 (1997).

⁴³ Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, *Report and Order, Further Notice of Proposed Rulemaking*, 16 FCC Rcd 5946, 5967 (2001) (describing revised procedures for resolving UHF maximization proposals over 200kW); Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, 1368-71 (1998) (describing objections to initial Commission decision to limit maximization requests to 200 kW).

⁴⁴ See Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, *First Report And Order And Further Notice Of Proposed Rule Rulemaking*, 16 FCC 2598, 2617 & n.131.

below a certain level, viewers are faced with a blue screen that will likely induce them to simply change channels.⁴⁵

3. The UHF Discount Remains Critical to the Development of New Broadcast Networks.

The UHF discount also has produced major public interest benefits by aiding in the emergence of new competitive broadcast networks. Both FOX and PAXTV have been built largely through the acquisition of numerous UHF stations. These networks could not have been constructed had their audience reach been calculated based on the same scale used for VHF stations. After the completion of all pending transactions, Paxson stations, for example, would reach over 63% of U.S. households if Paxson's UHF stations were considered to reach every home in their respective DMAs. With the discount, however, these stations reach only 31.5%, well under the current ownership cap.

PAXTV itself shows the value that the UHF discount has provided to television consumers. PAXTV provides a unique blend of family-friendly programming focused on core American values and free of the explicit sex, senseless violence and foul language that is found in so many television programs today. Launched in 1998, PAXTV now reaches over 87% of the country through its over-the-air broadcast distribution system and through cable and DBS carriage. Thus Paxson has expanded the array of choices available to all television viewers largely because of the flexibility the UHF discount gives station owners.

⁴⁵ See *Id.*

Although other emerging networks such as the WB and UPN have not constructed their networks by acquiring UHF stations, they have nonetheless depended largely on UHF affiliates in the construction of their fledgling distribution networks. Of 73 stations that report WB affiliation, for example, 67 are UHF stations.⁴⁶ Similarly, of 110 station that report UPN affiliation, 92 are UHF stations.⁴⁷ To the extent that the UHF discount promotes ownership of UHF stations by large group owners capable of providing high-quality non-network fare, the discount promotes the growth of these networks by promoting the growth and strength of their affiliates.

Consequently, retaining the UHF discount is likely to encourage the emergence of a larger number of competitive broadcast networks to join the existing seven. This result is plainly in the public interest, because it increases the diversity of sources and viewpoints in every market the new network reaches. This public benefit will be particularly strong for over-the-air viewers who do not have access to nearly the diversity of voices enjoyed by cable and DBS subscribers.

4. Maintenance of the UHF Discount Satisfies Section 202(h) Because It Is Necessary in the Public Interest.

Given the significant public interests served by the UHF discount, it goes without saying that retention of the discount was necessary under Section 202(h) two years ago, and remains necessary today. There is no substitute for the benefits that the UHF discount has provided to competitive networks in terms of easing the construction of broadcast (and accompanying cable and DBS) distribution outlets. Moreover, because

⁴⁶ See *Industry In Television 2002*, 1st Ed. BIA Financial Network, Inc. (2002).

⁴⁷ See *Id.*

the UHF discount was considered fully and reaffirmed only two years ago, the FCC will bear a heavy burden to eliminate it.⁴⁸ The Commission reaffirmed this rule in 2000 based on the reasons described above, and has received no information since that could lead it to conclude that its decision was an error or that significant new facts have arisen to justify a change in the rule. Moreover, unlike the other rules at stake in this proceeding, Section 202(h)'s presumption favoring repeal of broadcast ownership limits does not apply here because the UHF discount itself is inherently deregulatory in nature, *i.e.* it is an exception to the general regulation embodied in the national ownership cap.

5. If the Commission Decides to Eliminate the UHF Discount, Basic Principles of Fairness Require Grandfathering of Existing UHF Station Groups.

If, in the face of all this evidence, the Commission still decides to eliminate the UHF discount, Paxson strongly urges the Commission to grandfather all ownership interests existing at the time of its decision which would not comply with the national ownership rule absent the UHF discount. Grandfathering of existing ownership interests not only would be the fairest solution but also would be consistent with established precedent.

As described above, absent the UHF discount, Paxson's ownership interests would exceed the national cap, and would continue to do so unless the Commission

⁴⁸ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (reasoned opinion beyond that necessary to refrain from adopting a rule is required to discard a rule); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977); *National Wildlife Foundation v. Mosbacher*, 1989 U.S. Dist. Lexis 9748 (D.D.C. 1989) (overturning agency order amending 2-year old rule without reasoned explanation).

raises the cap to over 60%. To require Paxson (and similarly-situated group owners) to divest their interests if the UHF discount is eliminated would be manifestly unfair and not in the public interest. Indeed, failure to grandfather Paxson's interest could lead to the demise of the nation's seventh broadcast network. Neither Paxson nor other group owners should be penalized for their compliance with the FCC's ownership rules at the time those rules were in effect. Although the FCC has in various proceedings discussed whether to retain or modify the UHF discount, it has never suggested that it would require divestitures upon a change in the rule nor has it conditioned the grant of sale applications on the outcome of pending proceedings. Moreover, requiring Paxson to divest a portion of its stations, part and parcel of the PAXTV network, could seriously hamper PAXTV's ability to compete in the network business and to expand its original program offerings.

In the face of changes to its ownership rules, the Commission has in the past grandfathered ownership interests that would not comply with the new rule. In those cases, the Commission concluded that forced divestiture would have consequences adverse to the public interest and therefore should be undertaken only in the most serious circumstances. For example, when the Commission adopted the newspaper/broadcast cross-ownership prohibition in 1975, it required ownership divestitures only in the most "egregious" of cases, recognizing that "stability and continuity of ownership do serve important public purposes."⁴⁹ In that proceeding, the

⁴⁹ Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 FCC 2d 1046, 1078, 1080 ("1975 Second R & O"), *recon.*

Commission required divestiture only where the commonly-owned newspaper and broadcast interests had a monopoly in a community such that no other radio or television voice could be expected to serve the local community's needs and interests.⁵⁰ The Commission reached a similar conclusion in not requiring divestiture of existing radio/television combinations which pre-existed the adoption of the radio/television cross-ownership rule.⁵¹

The same rationale supports grandfathering of existing ownership interests in the event the Commission eliminates or restricts the UHF discount. The Commission must weigh the diversity and competitive benefits of divestiture against the adverse impact on local stations and network programming. Paxson submits that divestiture of its stations would have no benefit for the public in terms of increased diversity or competition. Of the 1,333 licensed commercial television stations in the United States,⁵² Paxson owns only 61, less than 5% of the total number of commercial stations. Notwithstanding this relatively small percentage, Paxson's stations represent an important network programming voice, offering viewers and advertisers a viable and wholesome alternative to other network programming, and contributing to diversity and economic competition in local markets. Forced divestiture would only result in disruption of local programming and service and most likely a discontinuation of PAXTV network programming in local markets. Divestiture also could adversely impact PAXTV as a

granted, Memorandum Opinion and Order, 53 FCC 2d 589 (1975), *modified, National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

⁵⁰ 1975 *Second R & O*, 50 FCC 2d at 1081-82.

⁵¹ *Id.* at 1054.

⁵² See Broadcast Station Totals as of September 30, 2002, *Press Release* (rel. November 6, 2002).

whole. In short, there would be no benefit to the public if Paxson was forced to divest a portion of its owned stations to comply with the national ownership rule.

A decision not to grandfather existing ownership interests also would violate existing constitutional and judicial restraints on the retroactive application of legislative rules. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy⁵³

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.⁵⁴ Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally induced, settled expectations of private parties. The Supreme Court has recognized that “[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides ‘an exceedingly persuasive justification.’”⁵⁵ The Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.⁵⁶

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements: (1) whether the case is one of first

⁵³ See 5 U.S.C. § 551(4)(1994) (emphasis added).

⁵⁴ See, e.g., *American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973); *Energy Consumers & Producers Ass’n, Inc. v. Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980).

⁵⁵ *Heckler v. Matthews*, 465 U.S. 728, 746 (1984) (citation omitted).

⁵⁶ Cf. Amendments of Parts 20 and 24 of the Commission’s Rules, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824, 7887 (1996); *CATV of Rockford, Inc., Memorandum Opinion and Order*, 38 FCC 2d 10, 15 (1972) *recon. denied*, 40 FCC 2d 493 (1973).

impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one.⁵⁷ Any decision by the FCC not to grandfather existing UHF ownership interests cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it has adopted new ownership restrictions.⁵⁸ A failure to grandfather existing ownership interests would be a radical and unjustified departure from this longstanding practice. As described above, the Commission would bear a heavy

⁵⁷ See, e.g., *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 11 FCC Rcd 2461, 2464 & n.42 (1995).

⁵⁸ See, e.g., Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations, *First Report and Order*, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross-ownership); 1975 *Second R & O*, 50 FCC 2d at 1074 (grandfathering broadcast-newspaper cross-ownership); Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, *Memorandum Opinion and Order*, 25 FCC 2d 318, 318 (1970) (no divestiture required by new multiple ownership rules), *aff'd*, *Mansfield TV, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *Memorandum Opinion and Order*, 3 RR 2d (P&F) 1554 (1964) (existing combinations grandfathered notwithstanding adoption of new contour overlap standards); Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *First Report and Order*, 63 FCC 2d 824 (regional concentration of control rules include grandfathering provisions), *modified in part*, 67 FCC 2d 54 (1977); Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, 5 RR 2d (P&F) 1609 (1965) (Top 50 Market policy includes grandfathering provisions).

burden to justify deviation from such a venerable practice under the Supreme Court's *State Farm* decision and its progeny.⁵⁹

Further, entities that have acquired UHF stations relied on Commission rules permitting the acquisitions based on application of the UHF discount. The courts have long recognized that fairness and equity are dispositive in determining the acceptability of retroactive regulation.⁶⁰ Here, it would be grossly inequitable for the Commission to require divestiture of stations acquired in good faith and reliance on the regulatory regime.

Retroactive application of a new national ownership rule also would impose significant burdens on UHF stations. Many of Paxson's UHF stations were weaker or newly-constructed when Paxson acquired them. The likelihood is that these stations would be economically devastated if divestiture were required. Under separate ownership, these stations would not have the same access to low-cost, competitive, diverse programming or significant financial resources, both of which are critical for the more vulnerable UHF stations. Forcing Paxson to sell these stations would adversely impact these stations' economic survival and, in turn, their service to the public.

⁵⁹ See *supra*, n. 44.

⁶⁰ See, e.g., *Helvering v. Griffiths*, 318 U.S. 371, 402 (1943); *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 600 (2d Cir. 1960), *cert denied*, 366 U.S. 908 (1961).

Failure to grandfather existing UHF ownership interests would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only would such action disserve the judicially-recognized legitimate government objective of protecting such interests, it also would disserve the public interest in enhanced television service.

C. Local Television Ownership Rule

The rule prohibiting local ownership of multiple television stations was originally enacted in 1964, and now is 38 years old.⁶¹ The rule was liberalized in 1999 to allow ownership where both stations are not in the top four stations in the market and where eight independently owned broadcast stations remain following the duopoly combination (the "top four ranked/eight voices test").⁶² The D.C. Circuit remanded this rule to the Commission because the Commission failed to justify the exclusion of other media from its top four ranked/eight voices test.⁶³ On remand the Commission should eliminate all restrictions on duopoly ownership and leave review of proposed duopolies to case-by-case Commission review and to the Department of Justice's anti-trust division.

1. The Commission Should Eliminate All Restrictions on Duopoly Ownership.

Although the *Sinclair* court did not strike down the duopoly rule as contrary to the public interest, the Commission now should recognize that current restrictions on duopoly ownership should be eliminated because they are not necessary as required by Section 202(h). Given the great diversity of voices available in every market through

⁶¹ *Ownership NPRM*, ¶¶ 73-74.

⁶² *Ownership NPRM*, ¶ 74.

⁶³ *Sinclair*, 284 F.3d at 165.

DBS, cable, newspapers, radio, television, and the Internet, the top four ranked/eight voice test is a superfluous safeguard against excessive media concentration in local markets.

The Commission's proposal to remedy this deficiency by developing a new, more comprehensive test of media diversity in local markets is a good example of the cart trying to drive the horse. The market and public demand has produced this diversity of media voices, and there is no reason the Commission should find it necessary to preserve it through *post hoc* regulations. There is no incentive for large station group owners to descend upon communities and extinguish the diversity that currently exists and no evidence that they have the ability or intention to do so. Consequently, a prophylactic rule designed to counter that result cannot be justified as necessary in the public interest.

When the Commission takes a comprehensive view of local media markets, it must find that the top four ranked stations part of its duopoly rules must be eliminated. This test was never well conceived because it doesn't actually promote or preserve diversity, but rather acts as a *de facto* cap on any station group owner's local household reach akin to the national ownership reach cap discussed above. Accordingly, this part of the rule cannot be justified even under the *Sinclair* court's blessing of the duopoly rule's function in preserving diversity.⁶⁴ A combination of the top two stations in a market will not lead to any fewer media voices in a market than a combination of the first and fifth ranked stations in that market. Moreover, it is far from clear that the top

⁶⁴ See *Sinclair*, 284 F.3d at 160.

four ranked test is necessary to protect competition for advertising dollars in local television markets. So long as multiple network-affiliated stations exist in a market, it is unlikely that a group owner even of the top two stations in a market would be capable of exercising market power in a local television advertising market. Accordingly, the top four ranked stations test cannot be shown to further the public interest, let alone to be necessary to do so.

Similarly, the eight voices test is flawed and should be eliminated. A comprehensive view of the available local media voices shows that regardless of the duopoly rules, a significant number of media voices will be available. The Commission developed the eight voices test to balance the benefits of duopoly ownership versus the loss of diversity thereby caused.⁶⁵ When the Commission views the diversity of voices available in every local media market, however, it must make a more compelling justification for denying the benefits of duopoly ownership to Americans unfortunate enough to live in small DMAs. Indeed, people in the smaller DMAs would likely benefit more from the increase in programming quality offered by duopolized stations.

Competition in local markets will be adequately safeguarded by case-by-case Commission and Department of Justice review of proposed station combinations that involve top four stations or markets that will be left with fewer than eight independently owned television stations following the duopoly combination. The Commission will not be required to approve transactions that create duopolies that would transgress the current rule, and would be free to intervene if a particular transaction appeared to

⁶⁵ *Duopoly Order*, 14 FCC Rcd at 12910-11.

threaten local diversity or competition. Given the ability of two federal agencies to control excessive consolidation on a case-by-case basis, the Commission cannot show that a prophylactic rule like the top four ranked/eight voices test is necessary in the public interest.

Instead, the Commission should allow unrestricted duopoly ownership regardless of station ranking or market size. As the Commission gains experience with unrestricted duopolies, the Commission may find it necessary to develop a test akin to its "50/70" screening rule it uses in the local radio context.⁶⁶ Conversely, if, after five years of unrestricted duopoly ownership, the market continues to produce current levels of diversity and competition, the Commission should begin exploring whether triopolies should be permitted.

2. Alternatively, NAB's "10/10 Rule" Would Provide Needed Relief to Small and Mid-Size Market Broadcasters.

If the Commission believes that an immediate transition to unrestricted duopoly ownership is imprudent, NAB's proposed "10/10 Rule" would be a reasonable transitional rule.⁶⁷ As Paxson understands it, the "10/10 Rule" would replace the eight-voices test with a presumption that any common ownership of multiple local stations would be acceptable – regardless of the number of voices in the market – if it involved two stations with audience shares of less than 10 or if it involved one station with a share of more than 10 and a second station with a share of 10 or less. Additionally,

⁶⁶ See, e.g., Great Empire Broadcasting, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 11145, 11149 (1999) ("*Great Empire Broadcasting*").

⁶⁷ See Comments of the National Association of Broadcasters, MB Docket Nos. 01-235, 02-277; MM Docket Nos. 02-244, 01-317, filed January 2, 2003.

station combinations that fail to meet this standard still would be entitled to case-by-case consideration of non-conforming applications, such as proposed triopolies.

If the Commission determines that its diversity goals require retention of some form of duopoly rule, NAB's proposal has much to recommend it. If the Commission chooses to follow this approach, it should carefully spell out what types of non-"10/10" arrangements will be most likely to receive favorable treatment. NAB suggests that the Commission retain its current preferences regarding duopoly waivers involving failed, failing, and unbuilt stations, and suggests that financial hardship associated with the DTV transition and the maintenance of local news operations should also be the basis for a waiver. Paxson agrees. The Commission should use the tools it has available to promote viable and robust stations at the local level, a swift DTV transition, and diverse programming serving local needs. To the extent that exceptions to any remaining duopoly rules serve these goals, the Commission should make those exceptions.

Short of elimination of the local television ownership restrictions, NAB's proposed "10/10 Rule," coupled with the reasonable waiver standard just described, would create the best set of probable outcomes. Although it may be preferable to the Commission's diversity goals to have the maximum number of different owners in each market, two separately-owned weak stations incapable of properly serving their communities' needs should be replaced, where possible by commonly owned duopolies. This result will maximize the benefits of local broadcasting, particularly to small and mid-sized communities, without compromising the Commission's policy goals.

D. The Newspaper Broadcast Cross-Ownership Rule Should Be Completely Repealed

Complete repeal of the newspaper/broadcast cross-ownership rule is long overdue. The Commission requested additional comment on this rule to the extent that comment on the other rules under review in this proceeding require it.⁶⁸ The only additional comment necessary, however, is that the Commission should delay no longer the repeal of this outmoded rule. The Commission already is in possession of a voluminous and detailed record that provides ample evidence that the newspaper/broadcast cross-ownership rule is contrary to the public interest, and accordingly, should dispose of the rule with due haste.

In brief, the record in Docket No. 01-235 reveals no evidence sufficient to enable the newspaper/broadcast cross-ownership rule to withstand scrutiny under Section 202(h). The newspaper/broadcast cross ownership rule clearly is not “necessary” in the public interest. All available evidence from markets containing grandfathered combinations indicates that the public is being richly served by a diverse and competitive array of local and national media voices. Indeed, all the relevant evidence suggests that this rule could not even satisfy a less rigorous standard than that laid out by Section 202(h), because it does not appear that the rule remains even arguably in the public interest.

The Commission adopted the newspaper/broadcast cross-ownership rule nearly twenty-eight years ago, frankly admitting that the rule was not designed to combat any particularized threat to the public interest, but rather to maximize diversity of local media

⁶⁸ *Ownership NPRM*, ¶ 7.

markets.⁶⁹ The Communications Act, however, no longer allows the Commission to override the benefits of free competition in the service of speculative goals that do not remedy any harm to the public interest. Moreover, the development of the newspaper and local broadcast industries has revealed that ownership restraints are more likely to impair than to increase diversity in local service.

As with its other broadcast ownership rules, it is time for the Commission to loose the chains of competition and allow the benefits to flow. Equally important, elimination of the blanket cross-ownership ban need not result in abdication of the Commission's oversight role over local media combinations. Instead, elimination of the ban will result only in a return to the *status quo ante* that proceeded the current rule. Both the Commission and the DOJ will be free to examine individual newspaper/broadcast combinations to ensure that local diversity and competition remain robust. Although this result may lead to a slightly greater expenditure of resources over time, it is the only approach supported by the record evidence in this proceeding.

E. Radio-Television Cross-Ownership Rule

The original radio/television cross ownership rule, which prohibited ownership of television and radio stations with overlapping service contours, now is thirty-two years old.⁷⁰ In 1999, however, the Commission relaxed this rule to permit common ownership of at least one radio and one television station in each market, with additional television

⁶⁹ 1975 *Second R&O*, 50 FCC 2d at 1048-49, 1049-50, 1079-84 (1975).

⁷⁰ Amendment of Section 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970), *recon. granted in part*, 28 F.C.C.2d 662 (1971).

and radio station ownership permitted in larger markets.⁷¹ Even this relaxed rule, however, cannot be adjudged necessary in the public interest and must be liberalized.

As with the national television ownership cap and the duopoly rule, the current radio/television ownership rule involves the Commission in the worst sort of speculative market engineering. The rule is based on the proposition that the market will not demand viewpoint or content diversity or localism and that the Commission must ensure achievement of these goals through prophylactic ownership regulations that ensure a certain number of separate media owners in each market. As described above, this proposition is both logically flawed and contradicted by the evidence already in this proceeding. The market will demand localism and it is just good business to provide it.⁷² Moreover, mid-sized and large multi-media market participants will be more likely to have the resources and risk capital necessary to provide diverse programming to niche markets than will smaller operators.

In addition, there is no special characteristic of the position of radio and television in local media markets that justifies special restrictions on ownership of both. The duopoly rules already control excessive concentration in broadcast television ownership and the local radio ownership rules already protect against that harm in the radio context. Obviously, any radio television combination that violates either of these rules should be forbidden. Beyond that, however, the Commission bears the heavy burden of satisfying Section 202(h)'s "necessity" standard in justifying further restrictions.

⁷¹ *Ownership NPRM*, ¶ 99.¶

⁷² See e.g. Hearing of the Senate Commerce, Science, and transportation Committee Regarding Media Concentration, July 17, 2001 (testimony of Mel Karmazin).